Nos. 18-422 and 18-726

In the Supreme Court of the United States

ROBERT A. RUCHO, ET AL., *Appellants*,

v.

COMMON CAUSE, ET AL., *Appellees*.

LINDA H. LAMONE, ET AL., *Appellants*,

v.

O. JOHN BENISEK, ET AL., *Appellees*.

On Appeals from the United States District Courts for the Middle District of North Carolina and the District of Maryland

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law was formed in 1963 at the request of President John F. Kennedy to involve private attorneys throughout the country in the effort to ensure civil rights to all Americans. Promoting and defending the voting rights of African Americans and other racial minorities is an important part of the Lawyers' Committee's work. The Lawyers' Committee has represented litigants in numerous voting rights cases throughout the nation over the past 50 years, including cases before this Court. *See, e.g., Shelby Cty. v. Holder*, 570 U.S. 529 (2013); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013); *Nw. Austin Mun. Utility Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Young v. Fordice*, 520 U.S. 273 (1997); *Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); *Connor v. Finch*, 431 U.S. 407 (1977). The Lawyers' Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court. *See, e.g., Benisek v. Lamone*, 138 S. Ct. 1942 (2018); *Gill v. Whitford*, 138 S. Ct. 1916 (2018); *Bethune-Hill v. Va. State Bd. of Elecs.*, 137 S. Ct. 788 (2017); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016); *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Shaw v. Reno*, 509 U.S. 630 (1993); *Thornburg v. Gingles*,

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[1] Pursuant to this Court's Rule 37.3(a), *amicus* states that all parties have granted blanket consent to *amicus* briefs. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

478 U.S. 30 (1986); *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The Lawyers' Committee has an interest in the instant appeals because they raise important voting rights issues that are central to its mission.

SUMMARY OF ARGUMENT

These cases are about partisan gerrymandering. But they also have implications for longstanding efforts to root out racial gerrymandering. Race and politics are often correlated—as the history behind the North Carolina congressional map in *Rucho v. Common Cause* confirms. *See Cooper v. Harris*, 137 S. Ct. 1455, 1465-66 (2017). Partisan gerrymandering can therefore inflict the same harm as racial gerrymandering: diluting the voting strength of racial minorities. Yet states often assert partisan gerrymandering as a defense to racial gerrymandering claims. If the Court were to declare partisan gerrymandering nonjusticiable, but continue to allow states to assert it as a defense, states could diminish the voting strength of racial minorities with impunity merely by couching their gerrymandering in political terms. To prevent that result, this Court should reaffirm that partisan gerrymandering claims are justiciable.

The defendants in *Rucho v. Common Cause* and *Lamone v. Benisek* argue that courts lack judicially manageable standards for resolving partisan gerrymandering claims. They are mistaken. Over the past several decades, this Court has developed a "flexible standard" for resolving challenges to state election laws that burden the First Amendment freedom of association and the Fourteenth Amendment right to cast an effective vote. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *see also Anderson v. Celebrezze*, 460 U.S. 780, 786-89 (1983). Under that standard, courts

(1) consider the character and magnitude of the alleged injuries to First and Fourteenth Amendment rights, (2) evaluate the state's purported justifications, and (3) measure the injuries against the justifications to determine whether the challenged law is constitutional. *See Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 789.

The Court should apply this "flexible standard" to partisan gerrymandering claims. Partisan gerrymandering burdens the same First and Fourteenth Amendment rights as the state election laws in decisions such as *Anderson* and *Burdick*. And courts can readily apply the *Anderson/Burdick* framework to partisan gerrymandering claims by considering the character and magnitude of the constitutional injuries that partisan gerrymandering inflicts, evaluating the state's purported justifications, and weighing the injuries against those justifications. Far from being unmanageable, this approach would bring the same methods of judicial analysis to bear on partisan gerrymandering that courts routinely use in other cases.

For example, in assessing the character and magnitude of the injuries from a partisan gerrymander, courts can draw upon cognate principles from racial gerrymandering cases. They can consider, in particular, whether partisan advantage was the predominant factor—the factor that could not be compromised—in drawing district lines. *Cf. Bethune-Hill*, 137 S. Ct. at 798. And in determining whether partisanship predominated, courts can draw on this Court's guidance concerning the types of evidence that are probative of discriminatory legislative intent. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-

68 (1977). Courts can also use various metrics to evaluate the magnitude of the effects of an alleged partisan gerrymander on voting and associational rights.

That is not to say, however, that the Court should use the cases now before it to fashion a one-size-fits-all approach to evidentiary matters in partisan gerrymandering cases. Rather, after confirming that partisan gerrymandering claims are justiciable and subject to the general *Anderson/Burdick* framework, the Court should allow subsidiary standards of proof within that framework to evolve over time.

The application of the *Anderson/Burdick* standards to the evidence in *Rucho* confirms that those standards are judicially manageable in partisan gerrymandering cases—and that the *Rucho* plaintiffs should prevail. North Carolina's 2016 congressional plan imposes extreme burdens on the *Rucho* plaintiffs' First and Fourteenth Amendment rights. And the State's justifications for imposing those burdens have no merit. This Court should therefore affirm the rulings in both *Rucho* and *Lamone* that partisan gerrymandering claims are justiciable, and affirm the *Rucho* district court's judgment that most of the districts in North Carolina's plan are unconstitutional.[2]

Finally, even if this Court were to rule that partisan gerrymandering claims are not justiciable, it should foreclose the all-too-common invocation of partisan gerrymandering as a defense to claims of racial gerrymandering. Partisan gerrymandering is an illegitimate practice that cannot justify denying an otherwise meritorious racial gerrymandering claim. And ruling out such a defense would prevent states from

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[2] The Lawyers' Committee takes no position on the merits of *Lamone*.

diluting the voting strength of racial minorities in the guise of partisan gerrymandering—a limitation that would become even more important in the event that partisan gerrymandering could not be affirmatively challenged.

ARGUMENT

I. The justiciability of partisan gerrymandering claims has important implications for racial gerrymandering claims.

States have a long and unfortunate history of diluting the voting strength of racial minorities through gerrymandering. *See, e.g., Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Despite efforts to eliminate it, racial gerrymandering remains a problem today. *See, e.g., Cooper*, 137 S. Ct. 1455 (2017); *Bethune-Hill*, 137 S. Ct. 788 (2017).

Partisan gerrymandering can equally dilute the voting strength of racial minorities. Because, in many jurisdictions, "racial identification is highly correlated with political affiliation," a district gerrymandered on partisan grounds can look the same as a district gerrymandered on racial grounds. *Cooper*, 137 S. Ct. at 1473 (quoting *Easley v. Cromartie*, 532 U.S. 234, 243 (2001)). Thus, in districts with racially polarized voting patterns and substantial minority populations, partisan gerrymandering can be the functional equivalent of—and inflict the same harm as—racial gerrymandering.

States nevertheless assert partisan gerrymandering as a defense to racial gerrymandering claims. North Carolina, for example, has taken this approach at least twice. *See Cooper*, 137 S. Ct. at 1465-66, 1473; *Easley*, 532 U.S. at 239-40. Other states have done the same. *See, e.g., Ga. State Conf. of NAACP v. Georgia*,

312 F. Supp. 3d 1357, 1364 (N.D. Ga. 2018) (Georgia); *Bush v. Vera*, 517 U.S. 952, 967-68 (1996) (plurality op.) (Texas).

It can be difficult for plaintiffs bringing a racial gerrymandering claim to overcome a partisan gerrymandering defense. Even when they have compelling evidence of race-based districting, plaintiffs may need to show that those racial considerations predominated over partisan ones. *See Cooper*, 137 S. Ct. at 1473-74 & n.7. Because race and politics are correlated, however, it can be challenging "to disentangle race from politics and prove that the former drove a district's lines." *Id.* at 1473.

The litigation in *Georgia State Conference of NAACP v. Georgia* exemplifies this difficulty. In that case, the plaintiffs asserted a racial gerrymandering claim concerning two state legislative districts redrawn in 2015. 312 F. Supp. 3d at 1359. Georgia defended those districts as partisan gerrymanders. *Id.* at 1364.

When the plaintiffs moved for a preliminary injunction, the district court found that the plaintiffs had "compelling" evidence that "race predominated" in redrawing the challenged districts. 312 F. Supp. 3d at 1365. For example, the plaintiffs showed that the motivation for redrawing the districts was that their racial demographics were changing. *See id.* at 1359-60, 1365. Recent elections in both districts had been close and featured racially polarized voting patterns, and both districts were experiencing an influx of racial minorities. *See id.* at 1360. The Republican-dominated Georgia legislature did not want these demographic changes to imperil Republican incumbents. *See id.*

The plaintiffs also showed that the new maps had the desired effect: They moved just enough African Americans out of the districts to swing the results of the 2016 election in the incumbents' favor. *See* 312 F. Supp. 3d at 1363. The redistricting caused the African American share of the voting age population in each district to decrease by more than 2% (or roughly 1,000 people). *See id.* The Republican incumbents then prevailed in the 2016 election by razor-thin margins: 222 votes in one district, and 946 votes in the other. *See Ga. State Conf. of NAACP v. Georgia*, 269 F. Supp. 3d 1266, 1272 (N.D. Ga. 2017). Even Georgia's in-house redistricting expert agreed that, but for the redistricting, both incumbents likely would have lost. *See* 312 F. Supp. 3d at 1360, 1363.

The plaintiffs also presented "persuasive" evidence that the map drawers redrew the districts based on racial data. 312 F. Supp. 3d at 1365. For example, the plaintiffs introduced "compelling" proof that the map drawers could only have relied on racial data when they split a number of precincts—because racial data existed at the sub-precinct level, but partisan data did not. *Id.* at 1365-66.

Despite this evidence, the district court denied a preliminary injunction. 312 F. Supp. 3d at 1369. It identified the conundrum that the state's partisan gerrymandering defense created:

> [Proving racial gerrymandering] is particularly hard to do when the State offers a defense rooted in partisan gerrymandering, as it did here. We did not move these voters because they are black, the State tells us. We moved them because they were Democrats. And under current Supreme Court precedent,

> the State tells us this motive is perfectly acceptable.

Id. at 1364. Confronted with this problem, the district court punted: It observed that the State's principal map drawer testified that she had relied only on political data, and not on racial data. *Id.* at 1367. Reasoning that the case therefore turned on a "credibility determination," the court gave the State the benefit of the doubt. *Id.*

That result epitomizes the consequences of permitting a state to assert a partisan gerrymandering defense to a racial gerrymandering claim. The Georgia legislature treated minority voters like pawns due to their race and their presumed political affiliation. Because minority voters' electoral power was increasing, the legislature stacked the deck by moving them out of competitive districts and into safe districts to ensure a particular electoral outcome. Whether the map drawer relied more heavily on political or racial data, the effect was the same: the dilution of African American voting strength. Yet the district court denied relief.

If this Court were to rule that partisan gerrymandering is not justiciable, yet still allow states to raise partisan gerrymandering as a defense to racial gerrymandering claims, it would intensify the problems highlighted by the Georgia case. States would be emboldened to engage in even more extreme partisan gerrymandering—knowing all the while that the effects would include the dilution of minority votes. The Court would, in effect, be licensing the disenfranchisement of racial minorities.

In contrast, confirming that political gerrymandering claims are justiciable, and identifying judicially manageable standards for those claims, would impose a much-needed check on the practice of asserting partisan gerrymandering as a defense to racial gerrymandering claims. That is because, in asserting such a defense, the state would be admitting that it committed an actionable constitutional violation. States would therefore be unable to inflict the harm of a racial gerrymander in the guise of a partisan gerrymander.

II. Declaring partisan gerrymandering claims non-justiciable would erroneously depart from this Court's precedent.

For over three decades, a majority of this Court has ruled that partisan gerrymandering cases are justiciable. *Davis v. Bandemer*, 478 U.S. 109, 118-27 (1986); *Vieth v. Jubelirer*, 541 U.S. 267, 307-68 (2004) (Kennedy, J., concurring in the judgment; Stevens, J., dissenting; Souter and Ginsburg, JJ., dissenting; Breyer, J., dissenting). That conclusion is consistent with the bedrock equal protection principle that challenges to redistricting plans containing malapportioned districts do not present non-justiciable political questions. *See Baker v. Carr*, 369 U.S. 186, 237 (1962). To reverse course and declare that partisan gerrymandering challenges are not justiciable would be unprecedented. This Court has never before moved a class of cases from the justiciable to the non-justiciable category.

Barring judicial review of partisan gerrymandering claims would be particularly anomalous because the practice is incompatible with the core democratic tenet that "the voters should choose their representatives, not the other way around." *Ariz. State Legis. v.*

Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2677 (2015) (internal quotation marks omitted); *see also McCutcheon v. Fed. Elec. Comm'n*, 572 U.S. 185, 192 (2014) ("[T]hose who govern should be the *last* people to help decide who *should* govern.").

The Framers would have agreed. Having considered the effects of "rotten boroughs" in Great Britain, *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964), they shared a concern about political mischief infecting redistricting. They thus included a provision in Article I, § 4, permitting Congress to "make or alter" congressional districts for the purpose of "check[ing] partisan manipulation of the election process by" state legislatures. *Vieth*, 541 U.S. at 275 (plurality op.) *see also id.* at 275-76. "[T]he people should choose whom they please to govern them," Alexander Hamilton stated at the New York constitutional convention, and "[t]his great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed." *Powell v. McCormack*, 395 U.S. 486, 541 (1969) (quoting 2 Debates on the Federal Constitution 257 (J. Elliot 2d ed. 1836)).

Modern elections are indisputably influenced by partisan gerrymanders, which have become "ever more extreme and durable" due to technology that enables "pinpoint precision in designing districts." *Gill*, 138 S. Ct. at 1941 (Kagan, J., concurring). As one of the district courts below put it, "cancerous" gerrymandering has become "widespread . . . in modern politics." *Lamone* J.S. App. 35a (internal quotation marks omitted).

The consequences are profound. Lawmakers, having chosen their voters, may disregard the citizenry's needs and concerns. Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially Manageable*

Standard and Other Reform Options for Partisan Gerrymandering, 46 Harv. J. on Legis. 243, 244 (2009). Even worse, "districts intentionally designed to subordinate voters based on party preference are more likely to actually suppress representation of that political viewpoint, whether that suppression is readily measurable or not." Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 Wm. & Mary L. Rev. 1993, 2028-29 (2018).

Like the defendants here, the State of Georgia argued in *Georgia State Conference of NAACP* that partisan gerrymandering cases cannot be adjudicated until courts identify a standard measuring the precise amount of partisanship that violates the Constitution. 269 F. Supp. 3d at 1281-83. That argument conflates standards with metrics. While this Court may continue to wrestle over the proper metric for measuring discriminatory partisan effect in any particular case, *see, e.g.*, *Gill*, 138 S. Ct. at 1932-33 (discussing the utility of efficiency gap analysis), that debate does not preclude the Court, in the meantime, from identifying a general, judicially manageable legal standard that applies to all cases. *See, e.g.*, Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate Over Quantifying Partisan Gerrymandering*, 70 Stan. L. Rev. 1503, 1510 (2018) ("One important point about the array of gerrymandering metrics that now exist is that no winner need be chosen among them. In other areas of election law, numerous measures happily coexist—for example, indices of population inequality, racial polarization, and geographic compactness. The same should be possible in the gerrymandering domain.").

This Court should therefore do what it has done before: identify a workable legal principle that lends

itself to a manageable test and allow lower courts to refine that test over time. In one-person, one-vote cases, for example, the Court declined to employ a specific substantive standard in concluding that Alabama's apportionment plans violated the Equal Protection Clause. It instead declared that "the deviations from a strict population basis are too egregious . . . to be constitutionally sustained." *Reynolds v. Sims*, 377 U.S. 533, 569 (1964). Although Chief Justice Warren declared in *Reynolds* that "mathematical nicety is not a constitutional requisite" in such cases, *id.*, the Court later determined that certain numerical thresholds were in fact appropriate. *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 751 (1973). By not crystallizing the particulars of the one-person, one-vote principle at the outset, *Reynolds* gave lower courts latitude to rein in severe malapportionment in the short term while allowing judicially manageable standards to evolve over time.

This Court should follow that example here and use these cases to identify the foundational legal principles guiding the adjudication of partisan gerrymandering claims.

III. This Court's decisions concerning challenges to state election laws provide judicially manageable standards for partisan gerrymandering claims.

Partisan gerrymandering implicates both the First Amendment freedom of association and the Fourteenth Amendment right to cast an effective vote. This Court has already developed standards for resolving challenges to state election laws that implicate those rights. *See, e.g., Burdick*, 504 U.S. at 433-34; *An-*

derson, 460 U.S. at 789. These decisions provide a judicially manageable framework for adjudicating partisan gerrymandering claims.

A. The Court has developed judicially manageable standards for challenges to state election laws.

State election laws can burden "two different, although overlapping, kinds of rights." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). One is a First Amendment right: "the right of individuals to associate for the advancement of political beliefs." *Id.* The other is a Fourteenth Amendment right: "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Id.*

These rights "rank among our most precious freedoms." *Williams*, 393 U.S. at 30. But they are not absolute. *Burdick*, 504 U.S. at 433. The states have the power to regulate elections, and "[e]lection laws will invariably impose some burden upon individual voters." *Id.* The question, therefore, is how to protect these fundamental rights while recognizing that, "as a practical matter, there must be a substantial regulation of elections." *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

This Court has answered that question by adopting a "flexible standard" for challenges to state election laws. *Burdick*, 504 U.S. at 434. A court "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments." *Anderson*, 460 U.S. at 789. "It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* Finally, it must weigh the

constitutional injuries against the asserted state interests, taking into account "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.*

The rigorousness of this inquiry depends on the extent of the injuries to First and Fourteenth Amendment rights. *Burdick*, 504 U.S. at 434. Election laws that impose "severe burden[s]" on these rights are subject to strict scrutiny and must be "narrowly tailored to serve a compelling state interest." *Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 451 (2008) (internal quotation marks omitted); *see also Burdick*, 504 U.S. at 434. But election laws that impose only "reasonable, nondiscriminatory restrictions" on First and Fourteenth Amendment rights are subject to lesser scrutiny, and "the State's important regulatory interests are generally sufficient to justify" them. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788).

There is no question that this "analytical process" is judicially manageable. *Anderson*, 460 U.S. at 789. Indeed, it "parallels [the] work" that courts do "in ordinary litigation." *Id.* And the Court has applied it to resolve challenges to state election laws for decades. *See, e.g., Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181, 189-91, 202-04 (2008) (opinion of Stevens, J.); *id.* at 204-05, 209 (Scalia, J., concurring in the judgment); *Wash. State Grange*, 552 U.S. at 458; *Calif. Democratic Party v. Jones*, 530 U.S. 567, 582-86 (2000); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364-70 (1997); *Burdick*, 504 U.S. at 438-40; *Tashjian v. Repub. Party of Conn.*, 479 U.S. 208, 213-14, 217-25 (1986); *Anderson*, 460 U.S. at 790-806.

B. The standards for challenges to state election laws can be applied to partisan gerrymandering claims.

These well-established standards also provide a judicially manageable framework for resolving partisan gerrymandering claims. Under that framework, the Court should (1) consider the character and magnitude of the injuries that a partisan gerrymander causes to rights protected by the First and Fourteenth Amendments, (2) identify the state's purported justifications for causing those injuries, and (3) measure the asserted injuries against the purported justifications to determine whether those justifications pass muster. *See Anderson*, 460 U.S. at 789.

1. Assessing the character and magnitude of the asserted injuries to First and Fourteenth Amendment rights

Courts are well equipped to examine the "character and magnitude" of the constitutional injuries inflicted by partisan gerrymandering. *Anderson*, 460 U.S. at 789. Those injuries include the infringement of equal protection rights that have been before this Court in its racial gerrymandering cases, as well as injuries to the associational and voting rights at issue in decisions such as *Anderson* and *Burdick*.

a. Equal protection rights. When assessing the "character and magnitude" of the constitutional injuries inflicted by a partisan gerrymander, courts should consider the state's intent. In particular, courts should analyze whether the predominant factor motivating the state—"the criterion that, in the State's view, could not be compromised," *Bethune-*

Hill, 137 S. Ct. at 798 (internal quotation marks omitted)—was to "subordinate adherents of one political party and entrench a rival party in power." *Rucho* J.S. App. 142a (quoting *Ariz. State Legis.*, 135 S. Ct. at 2658). If so, partisan gerrymandering burdens equal protection rights under the Fourteenth Amendment—and should therefore be subject to heightened scrutiny under this Court's election law cases. *See, e.g.*, *Anderson*, 460 U.S. at 786 n.7 (recognizing that the Court's election law cases have drawn on equal protection principles); *Williams*, 393 U.S. at 30 (explaining that "'invidious' distinctions" violate the Equal Protection Clause, and recognizing that equal protection rights are intertwined with the rights to associate and cast an effective vote in the election law context).

This predominant intent analysis has its roots in the Court's racial gerrymandering cases. In these cases, plaintiffs must show not merely that the legislature had some intent to gerrymander based on race, but that "race was the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Cooper*, 137 S. Ct. at 1463 (emphasis added; internal quotation marks omitted). The Court should apply a similar predominance analysis in partisan gerrymandering cases to avoid an outcome in which partisan gerrymandering would receive greater scrutiny than racial gerrymandering—which would be at odds with the principle that "[a] purpose to discriminate on the basis of race receives the strictest scrutiny under the Equal Protection Clause." *Vieth*, 541 U.S. at 293 (plurality op.).

This Court's racial gerrymandering cases establish that a predominant intent analysis is judicially manageable. Indeed, those cases provide a roadmap

for analyzing the legislature's intent in the gerrymandering context. As those decisions explain, predominant intent can be proven through direct evidence, circumstantial evidence, or both. *Cooper*, 137 S. Ct. at 1464.

Direct evidence of intent includes official expressions of legislative purpose and public statements by legislators concerning their motivations. *See Cooper*, 137 S. Ct. at 1475-76; *Rucho* J.S. App. 156-57; *Lamone* J.S. App. 49a-50a. It also includes proof that the legislature considered the illicit factor at issue—for example, testimony or other evidence demonstrating that the legislature looked at political data—when drawing district lines. *See, e.g.*, *Gill*, 138 S. Ct. at 1937 (Kagan, J., concurring); *Rucho* J.S. App. 157-59; *cf. Vera*, 517 U.S. at 961-63 (plurality op.) (determining that the state's consideration of racial data in its redistricting process contributed to the conclusion that race predominated).

Plaintiffs can also use circumstantial evidence to demonstrate the legislature's predominant intent. *See Cooper*, 137 S. Ct. at 1464. This Court's decisions concerning racial gerrymandering, as well as its decisions on racial discrimination more generally, provide guidance on the types of circumstantial evidence that bear on legislative intent—and that can therefore be used to show a predominant partisan intent. For example:

- The "historical background" of the challenged state action may be probative of unlawful intent, "particularly if it reveals a series of official actions taken for invidious purposes." *Arlington Heights*, 429 U.S. at 267. Here, historical background could include evidence that

the state previously districted for partisan advantage. *Cf. Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 224 (1964) (finding racially discriminatory intent where "the end result of every action" taken by the county board before the challenged decision "was designed to preserve separation of the races in the schools of Prince Edward County" (internal quotation marks omitted)).

- Procedural irregularities, such as "rush[ing] the map-drawing and Committee review process," can also be probative of improper intent. *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 723 (S.D. Tex. 2017); *see also Arlington Heights*, 429 U.S. at 267.
- Disregard for "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" can also contribute to a showing of predominant intent to gerrymander for partisan advantage. *Shaw*, 509 U.S. at 647 (concluding that such evidence was probative of racial gerrymandering).

Courts can consider these types of evidence, among others, to determine whether the legislature acted with a predominantly partisan intent, and thus to evaluate the "character and magnitude" of the injuries to equal protection rights caused by an alleged partisan gerrymander.

b. Associational and voting rights. Courts should also consider the "character and magnitude" of the injuries that an alleged partisan gerrymander causes to the First and Fourteenth Amendment rights addressed in decisions such as *Anderson* and *Burdick*.

Like other state election laws, partisan gerrymandering burdens the First Amendment freedom of association. It does so by "imposing burdens on a disfavored party and its voters." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment). For example, "deprived of their natural political strength by a partisan gerrymander," members of the disfavored party "may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives)." *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring); *see also id.* (explaining that *Anderson* concluded that "similar harms inflicted by a state election law amounted to a burden imposed on associational rights" (internal quotation marks and alteration omitted)).

Partisan gerrymandering also burdens the Fourteenth Amendment right to cast an effective vote. It does so by diluting the voting strength of members of the disfavored party who reside in districts that have been packed or cracked along partisan lines. It causes, in other words, the vote of a citizen in a gerrymandered district "to carry less weight than it would carry in another, hypothetical district." *Gill*, 138 S. Ct. at 1931; *see also id.* at 1935-36 (Kagan, J., concurring); *Bandemer*, 478 U.S. at 132 (plurality op.) (observing that partisan gerrymandering can result in unconstitutional vote dilution when it "consistently degrade[s] a voter's or a group of voters' influence on the political process as a whole.").

Courts are well equipped to assess the character and magnitude of these constitutional injuries from partisan gerrymandering. The analysis here is focused on effects rather than intent: The extent to

which partisan gerrymandering burdens the freedom of association and the right to cast an effective vote depends on the extent of the partisan advantage that it creates. And courts can consider a variety of evidence in analyzing the effects of a partisan gerrymander. For example, they can consider election results and expert analysis of metrics such as partisan asymmetry. *See Rucho* J.S. App. 188. And they can evaluate the durability of a gerrymander through expert evidence on other metrics, such as the sensitivity of election results to changes in circumstances. *See id.* at 190-91.

When considering such evidence, context is important, and each case will need to be evaluated on its own merits. In a "pinpoint" gerrymander like the one in *Georgia State Conference of NAACP*, which concerned only two districts rather than an entire plan, *see* 312 F. Supp. 3d at 1359, the magnitude and durability of the effects may not be as important as the direct evidence of the surgical precision with which the map drawers went about their business. In such cases, factors including deviation from traditional districting principles, *see id.* at 1362 ("more often, the new maps had a negative impact on these principles"), and unnecessary mid-cycle redistricting may, together with direct evidence of predominant partisan intent, be sufficient to show unconstitutional partisan gerrymandering, even if the durability and magnitude of the changes were relatively minor. *See id.* at 1368.

2. Considering the state's purported justifications

After analyzing the character and magnitude of the asserted injuries to First and Fourteenth Amendment rights, the next step in the *Anderson/Burdick*

framework is to assess the state's purported justifications. That step is also judicially manageable in the partisan gerrymandering context.

A state might conceivably assert a number of different justifications in a partisan gerrymandering case. For example:

- A state might contend that any burdens on First and Fourteenth Amendment rights result not from partisan intent, but instead from "political geography," such as the natural packing of Democratic voters in urban communities. *See, e.g.*, *Gill*, 138 S. Ct. at 1933; *Vieth*, 541 U.S. at 289-90 (plurality op.); *Rucho* J.S. App. 215.
- A state might also contend that its districting decisions were grounded in traditional districting principles, such as compactness, contiguity, and preservation of local government boundaries. *Cf. Gill*, 138 S. Ct. at 1927; *id.* at 1941 (Kagan, J., concurring).
- A state might further contend that it drew district lines based on a legitimate interest in minimizing the pairing of incumbents. *See Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

Courts also have judicially manageable methods for evaluating the strength of these asserted justifications. For example, the parties can submit alternative district maps that incorporate traditional redistricting principles and account for political geography. Courts can then compare the constitutional burdens imposed by those alternative maps to the burdens imposed by the actual map. If the alternative maps and the actual map impose similar burdens, the state's

justifications are strong. But if the actual map imposes greater burdens than the alternative maps, the state's justifications are weak. *See, e.g., Rucho* J.S. App. 217-22. This type of analysis—drawing on expert evidence to assess the strength of a party's explanations for its conduct—fits comfortably within the institutional capabilities of the judiciary.

3. Measuring the asserted injuries against the purported justifications

The final step in the *Anderson/Burdick* framework is to weigh the injuries to First and Fourteenth Amendment rights against the state's justifications. This step is also judicially manageable in partisan gerrymandering cases.

To be sure, evaluating the constitutional burdens vis-à-vis the state's justifications will require a case- and fact-specific analysis. And "[t]he results of this evaluation will not be automatic." *Anderson*, 460 U.S. at 789. "[H]ard judgments" will sometimes be needed. *Id.* at 790. But this Court does not declare a question non-justiciable merely because it may be hard. *See, e.g., Zivotofsky v. Clinton*, 566 U.S. 189, 205 (2012) (Sotomayor, J., concurring in part and concurring in the judgment). Rather, it does so when a question "turn[s] on standards that defy judicial application." *Id.* at 201 (majority op.) (internal quotation marks omitted).

Far from defying judicial application, resolving an issue of constitutional law by measuring First and Fourteenth Amendment injuries against state justifications is a "familiar judicial exercise." *Zivotofsky*, 566 U.S. at 196. Indeed, it is the same exercise that this Court has applied again and again in ruling on challenges to state election laws. *See supra* at 14.

Moreover, this Court's election law decisions provide even more particularized guidance for conducting this evaluation in a judicially manageable way. Those decisions instruct that, if a state districting plan imposes severe burdens on First and Fourteenth Amendment rights, courts should apply the well-known standard of strict scrutiny. *See Burdick*, 504 U.S. at 434. That will be true, for example, if the plaintiffs have powerful evidence both that (1) the legislature's predominant intent was to draw district lines for partisan advantage, and (2) the resulting map imposes substantial burdens on the voting strength and associational rights of members of the disfavored party. In the face of such evidence, it would be difficult for the state to satisfy strict scrutiny and show that its plan is narrowly tailored to serve compelling state interests.

If, in contrast, a state plan imposes only "reasonable, nondiscriminatory" burdens, courts should generally uphold the plan based on the state's "important regulatory interests." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788). Thus, for example, if the plaintiff cannot demonstrate that the legislature's predominant intent was partisan, or cannot show substantial vote dilution or associational injuries, the state will typically prevail based on its important interests in adhering to traditional districting principles.

IV. The application of these proposed standards to *Rucho* confirms that the standards are judicially manageable, and that the *Rucho* plaintiffs should prevail.

When the standards drawn from this Court's election law decisions are applied to the facts of *Rucho*, it

reinforces the conclusion that these standards are judicially manageable in the partisan gerrymandering context, and that the *Rucho* plaintiffs succeeded in proving an unconstitutional partisan gerrymander.

A. The *Rucho* plaintiffs have shown that the challenged districts impose severe burdens on their First and Fourteenth Amendment rights.

The *Rucho* plaintiffs' evidence proves that the districting plan at issue (the "2016 Plan") severely burdens their rights under the First and Fourteenth Amendments. Their evidence establishes both (1) a predominant intent to draw district lines to achieve a discriminatory partisan advantage, and (2) substantial injuries to their freedom of association and right to cast an effective vote.

1. Plaintiffs demonstrated that the General Assembly drew the 2016 Plan with a predominantly partisan intent.

The 2016 Plan had its genesis in an earlier congressional map adopted by a Republican-controlled General Assembly: the 2011 Plan. Representative David Lewis and Senator Robert Rucho were responsible for the 2011 Plan, and they engaged Dr. Thomas Hofeller to prepare it. *Rucho* J.S. App. 10. Their efforts exemplified the connection between racial and partisan gerrymandering: They designed the 2011 Plan both to achieve partisan advantage for Republicans and (based on a mistaken view of § 2 of the Voting Rights Act) to draw two majority-black districts. *See id.* at 12-13. Indeed, when voters challenged those districts as racial gerrymanders, North Carolina defended one of them as a partisan gerrymander. *See*

Cooper, 137 S. Ct. at 1473. The district court nevertheless held, and this Court agreed, that both districts were unconstitutional racial gerrymanders. *See id.* at 1481-82.

The General Assembly adopted the congressional map at issue here—the 2016 Plan—in a purported effort to remedy the racial gerrymanders in the 2011 Plan. The architects of the 2016 Plan were the same as the architects of the 2011 Plan: Representative Lewis, Senator Rucho, and Dr. Hofeller. *See Rucho* J.S. App. 15.

The *Rucho* plaintiffs offered overwhelming evidence, both direct and circumstantial, that the General Assembly's predominant intent in drawing the 2016 Plan was "to subordinate the interests of non-Republican voters and entrench Republican control of North Carolina's congressional delegation." *Rucho* J.S. App. 222.

a. Express statements of partisan intent. The direct evidence in *Rucho* includes numerous unabashed statements by Republican state officials that the 2016 Plan was meant to favor Republicans and disfavor Democrats.

For example, Representative Lewis and Senator Rucho instructed Dr. Hofeller that he should use political data from previous elections to draw a map that maintained the partisan makeup of North Carolina's congressional delegation under the racially gerrymandered 2011 Plan, which had produced 10 Republicans and 3 Democrats. *Rucho* J.S. App. 15.

The Republican leaders also proposed—and the Joint Committee on Redistricting adopted—criteria for the 2016 Plan that included "Political Data" and

"Partisan Advantage." *Rucho* J.S. App. 20. The "Political Data" criterion contemplated that "[t]he only data other than population data to be used to construct congressional districts shall be election results in statewide contests." *Id.* According to Representative Lewis, the purpose behind using this data was "to gain partisan advantage." *Id.* at 22. And the "Partisan Advantage" criterion itself provided that the Committee would "make reasonable efforts . . . to maintain the current partisan makeup of North Carolina's congressional delegation." *Id.* at 20.

Representative Lewis also made numerous additional statements that laid bare the Republican leadership's partisan intentions for the 2016 Plan. For example, he "acknowledged freely that [the 2016 Plan] would be a political gerrymander," and stated that the Plan was designed "to give a partisan advantage to 10 Republicans and 3 Democrats because he did not believe it would be possible to draw a map with 11 Republicans and 2 Democrats." *Rucho* J.S. App. 22 (alterations omitted).

b. Use of political data. The *Rucho* plaintiffs also presented evidence that the General Assembly followed through on its pledge to use political data to draw district lines for the 2016 Plan.

When Dr. Hofeller drew those lines, he "was constantly aware of the partisan characteristics of each county, precinct, and [census voting district]." *Rucho* J.S. App. 17. He used past political data to assign a "partisanship variable" to each precinct based on the likelihood that it would favor Republicans or Democrats. *Id.* at 157-58. He "used the partisanship variable to assign a county, [voting district], or precinct to one congressional district or another," and "as a par-

tial guide in deciding whether and where to split [voting districts], municipalities, or counties." *Id.* at 158 (internal quotation marks omitted). Then, after drawing each draft map, Dr. Hofeller "assess[ed] the partisan performance of the plan on a district-by-district basis and as a whole." *Id.* at 159.

This evidence establishes that political data was not merely *a* factor in drawing the 2016 Plan. It was the predominant factor. Political data determined where Dr. Hofeller drew district lines. It also provided the metric by which each draft map was assessed. The 2016 Plan is thus a paradigmatic example of a plan in which partisan advantage was "the criterion that, in the State's view, could not be compromised." *Bethune-Hill*, 137 S. Ct. at 798.

c. Historical background. The history behind the 2016 Plan corroborates the conclusion that the General Assembly drew the Plan with invidious partisan intent.

As explained above, the 2016 Plan arose after this Court ruled that two of the districts in North Carolina's 2011 Plan were unconstitutional racial gerrymanders. *Cooper*, 137 S. Ct. at 1481-82. In addition to being tainted by racial considerations, the 2011 Plan was also tainted by partisan ones. Indeed, the "primary goal" of the 2011 Plan was "to create as many districts as possible in which GOP candidates would be able to successfully compete for office," and "to minimize the number of districts in which Democrats would have an opportunity to elect a Democratic candidate." *Rucho* J.S. App. 180 (emphasis omitted).

This history of pursuing partisan advantage in the 2011 Plan renders the 2016 Plan suspect. That is

particularly so because the General Assembly "expressly sought to carry forward the partisan advantage obtained by Republicans under the unconstitutional 2011 Plan," *Rucho* J.S. App. 179, because it aimed "to change as few of the district lines in the 2011 Plan as possible in remedying the racial gerrymander," *id.* at 15-16 (internal quotation marks omitted), and because the same Republican leaders, and the same map drawer, led the redistricting process in 2011 and 2016, *see id.* at 10, 14.

d. Irregular procedures. The 2016 Plan is also the product of procedural irregularities.

The 2016 Plan was crafted without input from the public or Democratic members of the General Assembly. Dr. Hofeller had already completed a "near-final 2016 Plan" and presented it to Representative Lewis before public hearings even began. *Rucho* J.S. App. 18-19. When a public hearing was subsequently held and comments were received, Dr. Hofeller "was not apprised of any of th[ose] comments." *Id.* at 19. And Democratic members of the Joint Committee on Redistricting were neither "allowed to consult with Dr. Hofeller" nor given access to "the state computer systems to which he downloaded the 2016 Plan" after drafting it on his personal computer. *Id.* at 23. In a gross departure from procedural norms, therefore, Republican leaders shut the public and their Democratic colleagues out of the process for developing the 2016 Plan at every turn.

e. Departure from traditional redistricting principles. The many ways in which the 2016 Plan substantively departs from traditional redistricting principles further confirm its predominant partisan intent.

"To achieve the goal of concentrating Democratic voters" and "diluting Democratic voting strength," the 2016 Plan "divides municipalities and communities of interest along partisan lines" in all but one of North Carolina's thirteen congressional districts. *Rucho* J.S. App. 228, 232; *see also id.* at 227-73. For example, in District 6, the Plan cracks apart Guilford County and the City of Greensboro, "both of which traditionally support Democratic candidates," "mov[ing] individual [voting districts] from District 6 to District 13 . . . or vice versa, for political impact." *Id.* at 244. The consequence, consistent with partisan intent, is to "submerg[e Democratic] voters in a 'safe' Republican district." *Id.*

In a number of instances, the 2016 Plan also violates the traditional principle of geographic compactness. District 2, for example, "takes on a highly irregular shape," "includ[ing] a horseshoe-shaped section of Wake County." *Rucho* J.S. App. 232. This shape allows the district to "encompass[ ] the predominantly Republican suburbs of Raleigh, but exclude[ ] the Democratic core of Raleigh, which the General Assembly placed in [a] predominantly Democratic" district. *Id.*; *see also, e.g., id.* at 259 (explaining that District 10 has "a bizarre, bulbous protrusion into Buncombe County and the City of Asheville in the Appalachian Mountains" to crack Democratic voters).

2. Plaintiffs established that the 2016 Plan burdens their voting and associational rights.

In addition to proving that the predominant intent of the 2016 Plan was invidious partisan discrimination, the *Rucho* plaintiffs offered compelling evidence that the Plan imposes severe burdens on their First Amendment freedom of association and Fourteenth Amendment right to cast an effective vote.

Plaintiffs offered evidence of widespread, enduring vote dilution at the state and district levels. At a statewide level, plaintiffs showed that the 2016 Plan "dilutes the votes of non-Republican voters—by virtue of widespread cracking and packing—and entrenches the State's Republican congressmen in office." *Rucho* J.S. App. 188. Similarly, at the district level, plaintiffs established that "the General Assembly cracked or packed Democratic voters in [twelve of North Carolina's thirteen] districts and thereby diluted such voters' votes." *Id.* at 273. Plaintiffs also showed that these burdens "likely will persist through multiple election cycles." *Id.* at 190. Indeed, even if "Democratic candidates captured the same percentage of the vote (53.22%) that elected Republican candidates in ten districts in 2016, Democratic candidates would prevail in only four districts." *Id.* at 191 (emphasis omitted); *see also, e.g.*, *id.* at 197 (efficiency gap analysis shows that the 2016 Plan's effects are "durable").[3]

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[3] To be clear, a plaintiff should not be required to present evidence that vote dilution has already occurred in past elections, or that it will persist for an entire election cycle, to prevail on a partisan gerrymandering claim. Evidence that vote dilution will occur in the future, even if only in a single election, establishes a

Plaintiffs also established that the 2016 Plan burdens their associational rights. *Rucho* J.S. App. 290-91. For example, plaintiffs testified that their "get-out-the-vote efforts" have been less successful because voters feel that their votes do not "count"; that they have difficulty recruiting Democratic candidates because those candidates are unlikely to be elected; and that elected representatives in "safe" districts lack incentive to respond to constituents with opposing political views. *Id.* at 152, 292-93. "[T]hese chilling effects on speech and association . . . represent cognizable, and recognized, burdens on First Amendment rights." *Id.* at 292-93.

B. The evidence belies North Carolina's purported justifications for the 2016 Plan.

In the face of this compelling evidence that the 2016 Plan imposes severe burdens on plaintiffs' constitutional rights, the *Rucho* defendants identified two supposed justifications: (1) North Carolina's political geography (reflecting the "natural packing" of Democratic voters), and (2) an interest in protecting incumbents. *Rucho* J.S. App. 215. Neither holds weight.

Defendants' reliance on natural geography fails for a number of reasons. *See Rucho* J.S. App. 215-18. For example, plaintiffs' experts drew tens of thousands of maps based on traditional districting principles and non-partisan criteria. *Id.* at 217. Those maps accounted for North Carolina's political geography. *Id.* But none achieved the level of pro-Republican bias in the 2016 Plan. *Id.* Those maps therefore demonstrate

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sufficient threat of constitutional injury to require the state to justify that threat under the *Anderson/Burdick* framework.

that political geography cannot justify the burdens that the 2016 Plan imposes on plaintiffs' constitutional rights. *See id.*

Defendants' interest in protecting incumbents fares no better. The 2016 Plan paired two incumbents. *Rucho* J.S. App. 220. But plaintiffs' expert, Dr. Jowei Chen, drew 1,000 maps that avoided pairing *any* incumbents—and did so without the partisan skew of the actual 2016 Plan. *See id.* This analysis confirms that partisan intent, not an interest in minimizing the pairing of incumbents, drove the 2016 Plan.

C. The injuries inflicted by the 2016 Plan easily outweigh the State's purported justifications.

Because the predominant factor in drawing the 2016 Plan was partisan advantage, and because the 2016 Plan imposes substantial burdens on plaintiffs' First and Fourteenth Amendment rights, it is subject—at minimum—to close scrutiny. *See supra* at 23. No matter what level of scrutiny applies, however, the State's purported justifications are far too weak to validate the extreme burdens imposed by the 2016 Plan. The district court was therefore correct not only in ruling that partisan gerrymandering claims are justiciable, but also in ruling for the *Rucho* plaintiffs on the merits.

V. At minimum, partisan gerrymandering should not be a valid defense to racial gerrymandering claims.

If this Court were nevertheless to rule that partisan gerrymandering is not justiciable, it should also bring an end to the use of partisan gerrymandering as a defense in racial gerrymandering cases. It is true that the Court, in decisions such as *Cooper v. Harris*,

has previously treated partisan gerrymandering as a potential defense to racial gerrymandering claims. *See* 137 S. Ct. at 1473-78. But it has done so against the backdrop of its rulings, in *Bandemer* and *Vieth*, that partisan gerrymandering claims are justiciable. If the Court were to change course and rule that partisan gerrymandering claims are not justiciable, it should also revisit the question whether partisan gerrymandering can be a valid defense to claims of racial gerrymandering—and hold that it cannot.

That conclusion would help to avoid the troubling consequences described in Section I of this brief. It would also reflect a simple but venerable principle: Two wrongs do not make a right. This Court has determined that partisan gerrymandering is an illegitimate practice that is "incompatible with democratic principles." *Ariz. State Legis.*, 135 S. Ct. at 2658 (quoting *Vieth*, 541 U.S. at 292 (plurality op.) (alterations omitted)). The state should not be permitted to defend one illegitimate practice (racial gerrymandering) by asserting that it engaged in another illegitimate practice (partisan gerrymandering)—particularly if voters can no longer challenge the latter practice on its own terms.

Finally, at the very least, the Court should make clear that any ruling that partisan gerrymandering claims are not justiciable does not call into question the rule that states cannot use race as a proxy for politics when drawing district lines. *See Cooper*, 137 S. Ct. at 1464 n.1, 1473 n.7.

* * *

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must

live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry*, 376 U.S. at 17-18.

Drawing electoral maps with the intent to minimize particular voices in the democratic process is inconsistent with our most fundamental constitutional values. The harm from partisan gerrymandering can also be amplified by the correlation between race and politics and the resulting risk that partisan gerrymanders will dilute the voting strength of racial minorities. To prevent that harm, this Court should reaffirm that partisan gerrymandering claims are justiciable.

CONCLUSION

This Court should hold that partisan gerrymandering claims are justiciable and affirm the judgment in *Rucho*.

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